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Nos. 96-843 and 96-847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

and

AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS (NASCUS) IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS (NASCUS) IN SUPPORT OF PETITIONERS[1]

INTEREST OF AMICUS[2]

The National Association of State Credit Union Supervisors (NASCUS) is a professional association incorpo-

[1] Pursuant to Rule 37.6 of this Court, *amicus* certifies that no counsel for any party to this case authored this brief in whole or in part, and that no one outside the membership of NASCUS made a monetary contribution to the brief's preparation or submission.

[2] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clark of the Court.

rated under the laws of the District of Columbia as a non-profit corporation. NASCUS consists of the 47 state agencies that supervise credit unions in their states and the credit union supervisor for Puerto Rico.[3] Together, they supervise more than 40% of all U.S. credit unions. In addition, to assist in achieving its purposes, NASCUS has created several subsidiary groups: the NASCUS Credit Union Council, the NASCUS Foundation for the Preservation of Dual Chartering, and the National Institute for State Credit Union Examination.

The stated purposes of NASCUS are: (1) to provide appropriate communication between public officials supervising credit unions; (2) to strengthen the supervision of state-chartered credit unions; (3) to collect statistical information concerning credit unions in each state; and (4) to coordinate the policymaking efforts of individual states with respect to the formation and supervision of credit unions.

When the Federal Credit Union Act ("FCUA" or "Act") was enacted in 1934, 38 states already had vibrant and expanding credit union systems. The Act thus created an environment permitting regulatory competition, commonly known as the "dual chartering system," that provides individual credit unions with a regulatory choice, allowing experimentation among the states and between the states and the federal system. The experience of NASCUS' members within this dual chartering environment should inform the Court's interpretation of the Act.[4]

Although the FCUA does not apply directly to state-chartered credit unions, the construction placed on the

[3] The remaining states—Wyoming, South Dakota, and Delaware—do not permit state-chartered credit unions.

[4] NASCUS does not address the first issue to be determined by this Court, *i.e.*, whether banks are "suitable challengers" to the NCUA's interpretation of Section 109 of the Act.

Act by the United States Court of Appeals for the District of Columbia[5] could harm the state credit union system, as well as the federal system, by leading to a significant increase in charter conversions, undermining the dual chartering system, and threatening continued credit union viability. NASCUS has a strong interest in avoiding the adverse consequences arising from the Court of Appeals' decision.

SUMMARY OF ARGUMENT

The Court of Appeals held that the "common bond" provision of the FCUA, contained in Section 109 of the Act,[6] requires all members of a federally-chartered credit union to share a single common bond. *First Nat'l Bank & Trust Co. v. NCUA*, 90 F.3d 525 (D.C. Cir. 1996). The appeals court was apparently concerned that allowing multiple groups, each with a "common bond," to combine within a single credit union would harm its financial soundness. 90 F.3d at 529-30.

But state regulators know from their experience that the ability to have multiple common bond groups *strengthens* rather than reduces the financial soundness and stability of credit unions. Under a variety of state credit union statutes—many resembling the FCUA—state credit union regulators have long permitted multiple common bond group membership without ill effects. A few years before NCUA adopted the policy at issue here, an NCUA study found that 19 state credit union systems had common bond policies that were either "less restrictive" than NCUA policies or "very liberal."[7] Currently, 3 of

[5] A divided panel of the United States Court of Appeals for the Sixth Circuit recently adopted the reasoning of the D.C. Circuit. *First City Bank v. NCUA*, No. 95-6543, 1997 U.S. App. LEXIS 6753 (6th Cir. Apr. 14, 1997).

[6] 12 U.S.C. § 1759.

[7] NATIONAL CREDIT UNION ADMINISTRATION, *Studies In Federal Chartering Policy* 30 (1979) ("NCUA STUDY"). Although this

the 5 states with common bond language identical to the Act permit multiple common bonds.[8]

Credit unions—and common bond requirements—originated in the states, and state statutes provided the structure for the Act. In enacting the FCUA, however, Congress not only sought to make credit union membership widely available, but also to *broaden* those benefits beyond those offered by some states. The multiple common bond policy makes credit union membership available to many people who would otherwise be unable to join, and thus is fully consistent with that purpose. The Court of Appeals' decision would frustrate Congress' intent, however, by imposing an unreasonable restriction on credit union membership.

By creating a parallel chartering system, Congress ensured that credit unions existing in states with restrictive credit union policies would have the option of converting to a federal charter. This system of "regulatory competition" has provided credit unions with the ability to re-charter if one regulatory system or another fails to address adequately the needs of credit unions and their members. Both the state and federal systems have benefited from this productive regulatory competition, which has allowed a healthy diversity of regulatory innovations to flourish. Many significant advances in services to credit union members have begun in the states, including checking accounts, certificates of deposit, long-term mortgages, and credit cards. As the states have permitted credit unions to offer these services, the federal system has followed. The Court of Appeals' approach, however, is such a significant departure from accepted credit union organiza-

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report was drafted by a party to this dispute, it was cited by the trial court because "it predates by three years the interpretive change at issue in this case." *First Nat'l Bank & Trust Co. v. NCUA*, 863 F. Supp. 9, 12 n.11 (D.D.C. 1994).

[8] The three states of the five permitting multiple common bonds are Oklahoma, Tennessee, and Idaho.

tional practice that its effect would make a federal charter clearly unacceptable to many institutions. For many credit unions the single common bond concept would make the federal regulatory system so inherently undesirable that any semblance of "competition" will vanish.

The decision below has already begun to lead to a dramatic and unanticipated increase in charter conversions, as credit unions flee the newly-imposed restriction on federal system membership. Many more federal credit unions have applied to convert to state charters in the months since the appellate court decision than have done so in the last decade, even though that decision has effectively been stayed.[9] Should the Court embrace the Court of Appeals' decision, it would likely cause a stampede from federal to state charters.

While NASCUS members normally would not object to a healthy increase in the number of state-chartered credit unions, affirmance of the decision below would likely have a number of adverse effects:

- a dramatic influx of charter conversion application would unduly burden the operations of state regulators as they investigate credit union conversion applications, forcing them to divert valuable resources from other regulatory functions;
- the dual chartering system that has served credit unions so well would be undermined by these charter conversions, thwarting congressional intent to foster competitive chartering options and implementing bad public policy;
- in states where credit union regulators have adopted policies similar to the NCUA policy at issue here, affirming the lower court decision may

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[9] Between 1985-95, 83 credit unions converted from federal to state charters. Since the Court of Appeals' ruling, a NASCUS survey reports that 87 federal credit unions have substantially completed conversion to state charters.

create similar litigation and uncertainty at the state level;

- some federal credit unions would experience serious problems because state charter conversion would not be an economically viable option. Liquidation or insolvency could threaten federal credit unions with multiple common bonds and with significant operations based in states that either (1) do not authorize out-of-state branches; (2) do not permit multiple common bonds; or (3) have no state credit union law at all. This could strain the National Credit Union Share Insurance Fund (NCUSIF), which insures the shares and deposits of most state chartered credit unions.

NASCUS therefore submits that the decision below is contrary to the language and purpose of the Act and should be reversed. The decision contradicts the established policies of the majority of states that have permitted multiple common bond groups. There is no sound policy reason for overturning NCUA's judgment that it is unnecessary and unwise to require each credit union to have a single "common bond."

ARGUMENT

I. THE NATIONAL CREDIT UNION ADMINISTRATION'S INTERPRETATION OF THE FEDERAL CREDIT UNION ACT IS CONSISTENT WITH THE ACT'S PURPOSES.

This dispute centers on whether the phrase "groups having a common bond," as used in Section 109 of the Act, is singular or plural, *i.e.*, one group or many. This phrase is not defined or otherwise explained in the Act itself. Thus, in this instance, the Court should defer to NCUA's interpretation of the statute as long as that interpretation is reasonable. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984).

A well-developed state credit union system formed the backdrop for Congress' consideration and enactment of the FCUA. By creating a federal credit union system through the Act, Congress sought to make the benefits of credit union membership available to most Americans. *See* pp. 9-11, *infra*. But those benefits did not remain frozen as they existed in 1934. Over decades, a large majority of states adopted multiple common bond policies to permit greater access to credit unions and to strengthen those credit unions. In adopting its own multiple common bond policy, NCUA acted to achieve those same goals. As this Court stated in *Chevron*, "[a]n initial agency interpretation is not instantly carved in stone." *Id.* at 864. "An agency is not required to 'establish rules of conduct to last forever,' . . . but rather must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983)).

Because of the link between the state and federal systems, the state regulatory experience should inform this Court's assessment of Section 109. As the Court has stated, in determining the meaning of any statute, this Court looks "not only to the particular statutory language, but to the design of the statute as a whole and its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). "The meaning of statutory language, plain or not, depends on context.'" *Bailey v. United States*, 116 S. Ct. 501, 506 (1995) (quoting *Brown v. Gardner*, 115 S. Ct. 552, 555 (1994)).[10]

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[10] Legislative history "can be a legitimate guide to a statutory purpose obscured by ambiguity," *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); moreover, even if statutory language is "superficially clear, legislative history may call such apparent clarity into question." *Tataranowicz v. Sullivan*, 959 F.2d 268, 277 (D.C. Cir. 1992).

A. Congress Intended The FCUA To Broaden Participation In Credit Unions By Permitting Flexible Regulation That Built And Expanded Upon State Regulatory Authority.

1. *State Credit Union Policy Laid The Groundwork For the FCUA.*

The American system of credit unions traces its origins to the cooperative banks and building and loan associations of New England in the early 1900s, and before that to the credit cooperatives of mid-19th century Germany.[11] Credit unions arose in response to the need of working and middle-class Americans for credit on reasonable terms.[12] By 1934, thirty-eight states had credit union statutes and nearly 3000 credit unions served Americans.[13]

The financial distress of the banking system during the Depression of the 1930s led Congress to encourage alternatives to traditional banking.[14] Congress found the growing credit union movement to be one such alternative, especially in providing consumer credit.[15] In 1932, drawing upon the credit union laws of various states,[16] Congress enacted a credit union statute for the District of Columbia.[17] This statute prepared the way for Congress' enactment of the FCUA two years later.[18]

2. *Congress Created The FCUA To Establish A Dual System Of Credit Union Regulation That Would Spur Expanding Services.*

Congress wanted the federal credit union system not only to emulate the state system, but to expand upon its achievements. As noted above, 38 states had credit union stautes when the Act was passed. However, some state credit union statutes imposed onerous taxes or fees that undermined the benefits of credit union membership.[19] Congress saw the FCUA as a means to bring credit unions to the ten states without credit union laws, to provide more appropriate laws than existed in some states, and to create a federal system to make credit union service available across the country.[20]

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[11] *La Caisse Populaire Ste. Marie v. United States*, 425 F. Supp. 512, 518-20 (D.N.H. 1976), *aff'd*, 563 F.2d 505 (1st Cir. 1977). *See generally* J. CARROLL MOODY AND GILBERT C. FITE, THE CREDIT UNION MOVEMENT, ORIGINS AND DEVELOPMENT 1850-1980 (2d ed. 1984).

[12] The primary distinction between credit unions and other financial institutions is not the "field of membership" restriction, but a more basic difference, as described by the First Circuit in *La Caisse Populaire Ste. Marie*, 563 F.2d at 509:

> A credit union is a democratically controlled, cooperative, nonprofit society organized for the purpose of encouraging thrift and self-reliance among its members by creating a source of credit at a fair and reasonable rate of interest in order to improve the economic and social conditions of its members. A credit union is fundamentally distinguishable from other financial institutions in that customers may exercise effective control.

[13] S. REP. No. 555, 73d Cong., 2d Sess. ("SEN. REP.") 2 (1934).

[14] As the Court of Appeals conceded, the Act was not "intended to shield banks from competition." 90 F.3d at 529. It is apparent, however, that the banks have instituted this litigation because of competitive concerns, rather than from some amorphous public interest goal or desire to preserve the financial stability of credit unions.

[15] SEN. REP. at 1-4; H.R. REP. No. 2021, 73d Cong., 2d Sess. ("HOUSE REP.") 1-2 (1934).

[16] J. CARROLL MOODY AND GILBERT C. FITE, *supra*, at 98-99.

[17] 47 Stat. 326 (1932), *repealed by* Pub. L. 88-395, 78 Stat. 377 (1964). In 1964, the district's credit unions became subject to the FCUA. 12 U.S.C. § 1773.

[18] J. CARROLL MOODY AND GILBERT C. FITE, *supra*, at 98-99. Both the initial bill in the Senate and the final legislation as enacted by Congress drew heavily from the District of Columbia statute, which contained language that was itself borrowed from state credit union laws. SENATE REP. at 1-2.

[19] SEN. REP. at 4; HOUSE REP. at 2.

[20] HOUSE REP. at 2.

The Senate Banking and Currency Committee listed a variety of reasons for creating a federal credit union system, including:

> (c) In order to have a uniform development, the State laws differ in essential particulars and many of them are very imperfect, rendering normal development impossible.
>
> (d) In order to make credit union organization possible everywhere in the United States, 10 States at the present time have no credit union laws at all.
>
> (e) To escape overburdensome State taxation in some States and excessive organization fees in other States.
>
> —SEN. REP. at 4.

This view was echoed by the House Banking and Currency Committee:

> There are 10 States which have no credit union laws and by a single enactment the residents of those States would obtain the benefits of credit union organization. The committee is informed that in many of the States which have credit union acts, the inadequacy of the law or the lack of interest on the part of the State banking department tends to restrict proper credit development; also there are cases in which communities and organizations cross State lines and in these cases a useful sphere for Federal credit unions would seem to be presented.
>
> —HOUSE REP. at 2.

A principal purpose of the FCUA was thus to allow credit unions to avoid restrictive aspects of the existing state systems that were limiting credit union membership. Moreover, should federal regulators fail to adapt their regulations to evolving conditions, the FCUA allows credit unions to seek a more enlightened model among the states.[21] And since states also permit their credit

[21] 12 U.S.C. § 1771.

unions to convert to *federal* charters, passage of the Act created a system of "competitive regulation" that spurred further expansion of the pool of credit union customers and services within a sound regulatory regime.[22]

3. *The Multiple Common Bond Policy Is Consistent With Congress' Goal Of Broad Availability Of Credit Union Services.*

Multiple common bond membership is consistent with Congress' intent in passing the Act because it permits many Americans to join credit unions who would otherwise be unable to enjoy the benefits of credit union membership. NCUA adopted the multiple common bond policy to expand those benefits to the growing numbers of people employed in small, service-oriented, businesses.[23] Moreover, by opening existing credit unions to employees of these companies, NCUA not only increased the number of people receiving the benefit of credit union membership, but stabilized the financial health of the credit unions themselves.[24] As then-NCUA Chairman Edgar F. Callahan stated, the multiple group policy enabled credit unions to "take their eggs out of one basket so the credit

[22] The dual chartering system created by the FCUA has eliminated any "lack of interest" in credit unions among current state regulators, such as concerned the House Banking and Currency Committee in 1934. The very existence of NASCUS and the NASCUS Foundation for the Preservation of Dual Chartering evidences the success of Congress' creation of regulation competition.

[23] NATIONAL CREDIT UNION ADMINISTRATION, *1983 Annual Report* ("NCUA 1983 Annual Report") at 4 (explaining multiple common bond policy was an attempt to promote credit union survival despite layoffs and plant closings by large-scale employers by tapping into the boom in small and medium-sized business employment). *See also* Statement of Norman E. D'Amours, Chairman, National Credit Union Administration, *Issues Facing the Credit Union Industry: Hearing Before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Banking and Financial Services*, 105th Cong., 1st Sess. (1997).

[24] NCUA 1983 Annual Report at 4-5.

union won't rise or fall with its sponsoring organization." [25] By increasing the chances of survival of credit unions with failed sponsors, the safety and soundness of the entire credit union system was enhanced.

The Court of Appeals decision, if affirmed, would have exactly the opposite effect. If credit unions are forced to shed members who lack a single common bond, those organizations will become less financially secure. Moreover, according to a recent University of Wisconsin study, nearly 63 million workers—most earning below average wages and lacking health and pension benefits—will be unable to join federal credit unions if the lower court's decision is sustained.[26] These results are completely inconsistent with Congress' intent in enacting the FCUA.

The Court of Appeals' decision subjects the federal system to a restriction that will significantly limit participation in credit unions. As a result, the federal credit union system may well be so undermined that it will no longer present a competitive check. Thus, the dual system of regulation would be essentially destroyed. NASCUS submits that such a result turns the Act on its head.

B. State Credit Union Regulators Have Widely Permitted Multiple Common Bond Membership Without Ill Effects.

At the time NCUA adopted the multiple common bond policy, a significant number of states already permitted multiple common bond membership. By adopting this policy, NCUA was simply following the regulatory lead of the states.

In 1979, three years before NCUA announced its new rule, 19 states reported having field of membership poli-

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[25] *Id.* at 5.

[26] STEPHEN WOODBURY, DAVID SMITH, & WILLIAM KELLY, FILENE RESEARCH INSTITUTE AND THE CENTER FOR CREDIT UNION RESEARCH, UNIVERSITY OF WISCONSIN-MADISON, AN ANALYSIS OF PUBLIC POLICY ON CREDIT UNION SELECT EMPLOYEE GROUPS 3-4 (1997).

cies that were more liberal than the existing federal policy.[27] NCUA reported that in that same year 21.6% of all credit unions—federal and state—served more than one employee group.[28] By 1983, this percentage had increased to 36%.[29] NCUA acknowledged the leadership role played by the states in its 1983 Annual Report:

> In many cases, states began to adjust credit union membership policies to the changing workplace long before the Federal government did. States continued to provide even more flexibility in 1983 in chartering and field of membership policies, according to a recent survey by the National Association of State Credit Union Supervisors.[30]

Indeed, the 1983 NCUA report quotes Oklahoma's Bank Commissioner as stating that "recent Federal field of membership policy changes have done little more than catch up to the field of membership policies as determined by the Oklahoma Credit Union Board." [31]

One state that preceded NCUA in permitting multiple common bonds is Michigan, whose credit union statute opens credit union membership to "groups, of both large and small membership, having a common bond of occupation or association . . . ." MICH. COMP. LAWS 490.5 (1997). The Michigan Court of Appeals found that this statute "permits a single credit union to have a field of membership consisting of employees of more than one group as long as the composition of each group is based on a single criterion." *Casazza v. Michigan Dept. of*

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[27] NCUA STUDY at 30 (citing Credit Union National Association study).

[28] NCUA 1983 Annual Report at 10 (citing 1979 data).

[29] *Id.*

[30] *Id.* at 9.

[31] *Id.*

Commerce, 350 N.W.2d 855, 862 (Mich. Ct. App. 1984).[82]

The court found that Michigan's credit union statute was not designed to "curtail possible competion by the credit unions with the banking and savings and loans institutions. We view the intent of the Michigan credit union statute to be to encourage growth of credit unions and increases in membership." *Id.* at 857. The court concluded:

> We agree that in establishing permissible fields of membership, economic viability must be considered. This simply means that while 50 or 60 years ago a very small group may have been capable of supporting a successful credit union, under today's economic circumstances that is no longer possible, but a collection of several small groups could provide enough members to make a viable credit union.[83]

The court further noted that any other result could have wide-ranging adverse consequences on credit unions and their ability to serve their members.[84]

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[82] The relevant language of the Michigan statute has not changed since the *Casazza* decision. Although the opinion was rendered in 1984, the policy was announced in 1980 and confirmed by the agency in 1981, well before NCUA adopted its multiple common bond policy. 350 N.W.2d at 858. The court also observed that Michigan's credit union regulator, upon recommending the multiple common bond policy in 1981, noted that there were already at least 11 Michigan credit unions with similar membership criteria. *Id.*

[83] *Id.* at 860.

[84] *Id.* North Carolina regulators also attempted to open up credit union membership to multiple common bond groups, but the North Carolina Supreme Court (reversing a unanimous appeals court decision) refused to permit this. *North Carolina Savings & Loan League v. North Carolina Credit Union Comm'n*, 276 S.E.2d 404 (N.C. 1981). Unlike the FCUA and the Michigan statute, however, the North Carolina law limits membership to persons with "the common bond." N.C. CODE § 54-109.26(a). The North Carolina court held this language imposed an "obvious" requirement that there be "one and the same common bond" between all members of a credit union. 276 S.E.2d at 411. No similar language appears in Section 109.

Moreover, the North Carolina result was criticized by both the Michigan court and by two dissenting North Carolina Supreme Court justices who noted:

> The really sad aspect of the majority's opinion is that thousands of local government employees who are not eligible for credit at private for-profit financial institutions simply cannot obtain the credit needed "to improve their economic and social conditions." The statute entitles them to membership in the State Employees' Credit Union where such credit would be available. The majority erroneously denies them this privilege.
>
> —*Id.* at 416-17.

For many of same reasons cited by the Michigan court, multiple common bond policies have been adopted in a wide variety of jurisdictions—from states like Oklahoma and Tennessee whose credit union statutes resemble the FCUA,[85] to states like New York and California that provide broad agency discretion over field of membership issues.[86]

The states have authorized multiple common bonds for the same reasons cited by NCUA in adopting the policy in dispute here.[87] As both the Court of Appeals and the

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[85] OKLA. STAT. § 6-2007 (1997) ("limited to groups having a common bond . . . ."); TENN. CODE ANN. § 45-4-301 (1997) ("limited to groups having a common bond . . . .").

[86] CAL. FIN. CODE § 14155 (1997) (state regulator may deny change in field of membership only in limited circumstances); N.Y. BANKING LAW § 451 (1997) (credit union "membership shall be limited to persons having one, or with the approval of the superintendent, which approval shall not be given if it would be destructive of competition [among credit unions] within a municipality, more than one common employer . . . .").

[87] Statement of David L. Paul, Chairman, National Association of State Credit Union Supervisors, Commissioner, Division of Financial Services, State of Colorado, *Issues Facing the Credit Union Industry: Hearing Before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Banking and Financial Services* (hereafter "Paul Testimony"), 105th Cong., 1st Sess. (1997).

District Court acknowledged, the multiple common bond policy allows credit unions to benefit from economies of scale and to diversify membership to stay strong even if one group of members encounters financial difficulty. 90 F.3d at 526; 863 F. Supp. at 13. It also permits groups that are too small to form their own credit union to join a preexisting one. 90 F.3d at 527. As such, it is fully consistent with the Act's purpose.

In assessing Section 109 of the Act, the Court of Appeals expressed a fear that credit unions with multiple common bond membership might not be able to "loan on character," suggesting this could harm credit unions in some way. 90 F.3d at 529-30. The appeals court offered no support for its speculation that this harm would result. NASCUS submits that it is not aware of any experience in the many states that now permit multiple common bonds that would lend credence to the appeals court's speculation. Indeed, reversing the trend of failures among single common bond credit unions was a primary reason why the multiple common bond policy was adopted in the first place.[38]

As NASCUS Chairman David L. Paul recently testified to Congress:

> Just as farmers have warned us about putting all our eggs in one basket, regulators have come to understand that there is generally value in mixing employers in the field of membership of credit unions. Diverse employers help ensure the economic viability of credit unions—an observation which probably prompted the NCUA to approve small employer groups for federal credit unions during the economic downturns of the early 1980s.[39]

The appeals court also seemed concerned that some credit unions had grown quite large under the multiple

[38] NCUA 1983 Annual Report at 5.

[39] Paul Testimony.

common bond policy. 90 F.3d at 530. This alone cannot be a valid concern; numerous single employers in today's economy have tens of thousands of employees, and some well over 100,000. For example, the State Employees Credit Union in North Carolina had nearly 600,000 members as of March 1996.[40] Yet under any view of the statute, all of these persons properly belong to a single credit union.

II. A FEDERAL RESTRICTION ON MULTIPLE COMMON BONDS WOULD ADVERSELY AFFECT THE DUAL CHARTERING SYSTEM.

A. The Court Of Appeals Decision Has Already Led To Substantial Charter Conversion Activity.

Credit unions may be chartered under either state or federal law and may recharter if either system of regulation becomes unreasonably restrictive. 12 U.S.C. § 1771. Of course, Congress did not contemplate misguided and extreme limitations that would lead to wholesale conversions from the federal system. The Court of Appeals' decision imposes economically irrational restrictions on federal credit unions that do not exist for most of their state counterparts, thereby creating the potential for a large number of federally-chartered credit unions seeking conversions to state regulation. This influx threatens to divert scarce state regulatory resources from other important areas of responsibility to rechartering issues.

A survey of NASCUS members taken immediately after the Court of Appeals' decision reported that approximately 200 federally chartered credit unions had recently contacted their state regulatory agency to inquire about the conversion process in their state.[41] Since the Court of

[40] NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS, FACTS AND FIGURES ON STATE CHARTERED CREDIT UNIONS ("NASCUS Facts and Figures") 4 (March 1996).

[41] Paul Testimony. *See also* Bill McConnell, *Federal Credit Unions Eye Shift To More Liberal State Charters*, THE AMERICAN BANKER, February 27, 1977 at 2; NATIONAL ASSOCIATION OF STATE

Appeals' decision, state regulators have received 96 formal requests by federally chartered credit unions to approve their conversion to a state charter, and 87 credit unions have substantially completed conversion to state charters.[42] This figure is nearly three times the total number of charter conversion requests for the past decade,[43] and constitutes nearly 1.5% of the total number of federal credit unions as of the date of the appeals court's decision. Charter conversion is occurring in states across the country, including Colorado, Florida, Illinois, New Hampshire, Ohio, Texas, and Washington state.[44]

If the lower court's decision is not reversed, a large number of charter conversion applications from federal credit unions to state regulators will place an unfair and unnecessary burden on the states. The application review process can be time-consuming. The conversion process generally requires careful analysis of the credit union's financial standing. Appropriate conversion procedures

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CREDIT UNION SUPERVISORS AND THE CREDIT UNION NATIONAL ASSOCIATION, INC., 1997-98 PROFILE OF STATE CREDIT UNION SUPERVISORY AGENCIES (hereafter "1997-98 NASCUS Profile") at 224.

[42] NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS, *Membership Survey* (April 1, 1997). Indeed, Respondents appear to recognize that this is occurring. *See* Brief of Respondents First National Bank and Trust Co. *et al.* in Opposition to Petition for Certiorari at 18 n.20 ("Federal credit unions operating in states that do not impose a common bond requirement for state-chartered credit unions may convert their charters . . . and, if press reports are accurate, many have already taken steps toward doing so.").

[43] CREDIT UNION NATIONAL ASSOCIATION, DEPARTMENT OF ECONOMICS AND STATISTICS, *CU Changes From Federal To State Charter* (April 22, 1997).

[44] According to a recent article, since July 1996, 134 federal credit unions have asked NCUA for permission to switch from an occupational or associational charter to a community charter, while 66 have notified NCUA of their intention to convert to state charters. Dean Anason, *Credit Unions Eye Charter Flips To Evade Court Ruling*, THE AMERICAN BANKER, March 24, 1997 at 2.

can, thus, take months.[46] Several states even require hearings for charter applications.[46] The burdens involved in these processes must be borne by state regulators and all state-chartered credit unions. In the end, credit union members will lose.[47]

B. Undermining The Dual Chartering System Is Bad Public Policy.

The first fatalities of the influx of federal to state charter conversions will be the dual chartering system and healthy regulatory competition. If the federal system is so weakened that it is no longer a viable option for large credit unions, the healthy regulatory competition that has spurred credit union development will disappear. A weakening of the dual chartering system creates the potential for decreasing services and fewer credit unions at both the state and federal levels.

Since credit unions have the ability to "vote with their feet" and convert between a state or federal charter as needed, federal and state regulators must be responsive to the appropriate competitive needs of credit unions and their members. Competitive regulation is explicitly acknowledged in Montana's credit union statute, which authorizes state-chartered credit unions to engage in the same activities as their federal counterparts, if the state regulator approves. Montana's statute requires the state regulator to permit such activities "if he finds that it fosters competitive equality between state and federal

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[45] NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS, CHARTER CONVERSION GUIDE—FEDERAL TO STATE (1996).

[46] 1997-98 NASCUS Profile at 167.

[47] Charter conversion imposes substantial costs on the converting credit union as well. For example, the Nevada Federal Credit Union in Las Vegas is changing to a state charter. Its president states that it will require "significant paperwork" and cost "several hundred thousand dollars" to accomplish the charter conversion and related tasks. Dean Anason, *supra*, at 2.

credit unions and prevents adverse effects on members of state-chartered credit unions."[48] Similarly, the Arkansas legislature amended its credit union statute in 1979 to respond to what it deemed "an unfair competitive advantage" held by federal credit unions over their Arkansas-chartered counterparts.[49]

By the same token, for many state credit unions, conversion to a federal charter will no longer be a practical alternative in the event that state regulations become too restrictive. For example, multi-state credit unions must be able to serve their members, regardless of location. At present, the Act allows for the creation of multi-state multiple common bond institutions even in states that do not permit out-of-state-chartered credit unions. A number of states restrict or prohibit operations by credit unions chartered in other states. The interstate capacity of federal credit unions fulfills one of the purposes stated by Congress enacting the Act in the first place.[50] If the Court upholds the lower court's decision, however, multi-state multiple common bond institutions will be, at the very least, threatened with restrictions.

If this Court affirms the decision below, states in which credit union regulators have adopted policies similar to the NCUA policy at issue here may face similar challenges to their own multiple common bond policies. If those policies are struck down, state credit unions may be weakened and begin to fail, asserting claims against the NCUSIF, which insures 86% of state credit unions.[51] Such a drain on the Fund, coupled with that from failing

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[48] MONT. CODE ANN. § 32-3-206 (1997).

[49] ARK. STAT. ANN. § 23-35-401 note (quoting "emergency clause") (1997).

[50] HOUSE REP. at 2 ("there are cases in which communities and organizations cross State lines and in these cases a useful sphere for Federal credit unions would seem to be presented").

[51] NASCUS Facts and Figures at 3.

federal credit unions, weakens the solvency of the Fund and threatens services to members.

Credit unions have succeeded in large part because a healthy dual system of federal and state credit unions has spurred each system to improve. Weakening the federal system through unnecessary and ill-advised restrictions will harm not only the federal system, but also threatens grave harm to the parallel state system, and to the competitive vibrancy of the dual chartering system itself.

CONCLUSION

For the reasons stated above, NASCUS respectfully submits that the judgment should be reversed.

Respectfully submitted,

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